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No. 90-896

Supreme Court, U.S.
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JOSEPH E. SPANIOLO, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

JACK F. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

KENNETH W. STARR
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Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence marijuana plants that were seized from a garden adjacent to his residence.

1. Petitioner was indicted by a grand jury sitting in the Eastern District of Arkansas. He was charged with manufacturing and possessing marijuana, in violation of 21 U.S.C. 841. Before trial, petitioner moved to suppress as evidence marijuana plants that an officer had seized from petitioner's garden after

the officer responded to a burglar alarm. On June 19, 1989, the district court suppressed the plants as evidence on the ground that while the officer properly observed the plants, he did not have probable cause to believe that the plants were marijuana before he plucked a leaf. The court therefore found that the seizure could not be justified under the plain view doctrine, which requires that the incriminating nature of the object to be seized be immediately apparent. Pet. App. A1-A5.

The court of appeals reversed. Pet. App. B1-B5. The court held that the district court had applied an incorrect legal standard in requiring the officer to be certain that the plants were marijuana before he plucked a leaf. The court concluded that it was lawful for the officer to seize the plants under the plain view doctrine because he had probable cause to believe that the plants were marijuana.

2. Petitioner contends (Pet. 1-11) that the officer had only reasonable suspicion, not probable cause, for seizing the marijuana plants, and that the court of appeals improperly applied the clearly erroneous standard in its review of the case. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, re-

view by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

DECEMBER 1990

* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.